87-1778

Supreme Court, U.S.
FILED
MAR 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LEWIS B. SCKOLNICK,

PETITIONER,

v.

DAVID R. HARLOW,
JEANNE L. HARLOW,
LAURA J. HOWARD,
KATHY STEFAN REAL ESTATE, INC.,
KATHY STEFAN, and
ANDREA BELMONT,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

LEWIS B. SCKOLNICK
PRO SE
511 LONG PLAIN ROAD
LEVERETT MA 01054
413 548 9279

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1. Whether the affirmation by the lower court of the judgment of the district court for the reasons set forth in the district court's July 17, 1986 memorandum was appropriate while genuine issues as to material facts remain?

Prefix

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1. Whether the affirmation by the lower court of the judgment of the district court for the reasons set forth in the district court's July 17, 1986 memorandum was appropriate while genuine issues as to material facts remain?

Prefix

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LEWIS B. SCKOLNICK

PETITIONER,

v.

DAVID R. HARLOW,
JEANNE L. HARLOW,
LAURA J. HOWARD,
KATHY STEFAN REAL ESTATE, INC.,
ANDREA BELMONT,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

The petitioner, Lewis B. Sckolnick, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on October 6, 1987. vi

OPINION BELOW

The Court of Appeals entered its Judgment decision affirming the finding of the district court on October 6, 1987. A copy of the judgment is attached at RA32-RA36.

The Court denied petitioner's petition for rehearing without a suggestion for rehearing *en banc* on December 31, 1987. A copy of the order is attached at RA37-RA38.

JURISDICTION

On October 6, 1987 the Court of Appeals entered judgment affirming the judgment of the district court for the reasons set forth in the district court's July 17, 1986 memorandum. (RA32-RA36). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution was not invoked in the courts below.

STATEMENT OF THE CASE

On October 6, 1987, a panel of the First Circuit Court of Appeals entered judgment affirming the judgment of the district court for the reasons set forth in the district court's July 17, 1986 memorandum. Lewis B. Sckolnick v.

David R. Harlow, ET AL., No. 86-1774 (1st Cir. 1987). A timely petition for rehearing pursuant to Rule 40 (a) and (b) of the Federal Rules of Appellate Procedure was filed on October 19, 1987, with an addendum filed on December 22, 1987, and the petition with addendum was denied by order of the court on December 31, 1987 by the First Circuit.

The order, memorandum and judgment of the district court (RA8-RA31B) come from the allowed motions of the respondents which sought on the part of Kathy Stefan Real Estate, Inc., Kathy Stefan and Andrea Belmont to dismiss for failure to state a claim, on the part of David R. Harlow and Jeanne L. Harlow for summary judgment and on the part of Laura J. Howard to dismiss, coming all in response to the complaint filed by the

petitioner on December 30, 1985, entitled Lewis B. Sckolnick v. David R. Harlow, ET AL., No. 85-0491-F. Within said complaint petitioner seeks declaratory relief, injunctive relief and damages in accordance with Title 28 U.S.C. Sec. 2201, Title 42 U.S.C. Sec. 3612 and Title 42 U.S.C. Sec. 3617 for having met with subjective discrimination and disparate treatment due to his religion, Judaism, when he attempted to purchase real estate owned by David R. Harlow and Jeanne L. Harlow, the same real estate being offered for public sale by the owners through their real estate brokers Kathy Stefan Real Estate, Inc., Kathy Stefan and Andrea Belmont. The real estate was sold at private sale to respondent Howard by respondents Harlows.

The Motions to Dismiss should

have been denied because in determining the sufficiency of a pro se Complaint, it is now axiomatic that a federal court must construe a pro se complaint liberally, applying less stringent standards than when a petitioner is represented by counsel. Hughes v. Rowe, 449 U.S. 5, 9 (per curiam, 1980); Haines v. Kerner, 404 U.S. 519, 520 (per curiam, 1972).

In order to warrant such dismissals, the complaint, considering all its allegations as true, must be frivolous on its face or wholly insubstantial. See Cooper v. Pate, 378 U.S. 546 (per curiam, 1964); Moorish Science Temple of America v. Smith, 693 F.2d 987, 990 (see CA.2, 1982).

With these principles in mind, it is clear that it was premature to dismiss petitioner's complaint at the stage that

it was. The complaint alleges serious federal civil rights violations. As stated by Professor Moore in his treatise (2A Moore's Federal Practice, Para. 8.02):

> "The real importance of the Rules dealing with pleadings is that they make pleadings, in and of themselves, relatively unimportant. Cases are to be decided on their merits."

The motions for dismissal filed by all of the respondents other than Laura J. Howard, contained matters outside of the pleadings which were presented to and not excluded by the district court. Such actions under Rule 12(b)(6) are thus converted and treated as though motions for summary judgment and must be disposed of as provided in Rule 56. See Notes of Advisory Committee on Rules, 1946

Amendment, in Federal Civil Judicial Procedure and Rules, West Publishing Company, 1987, pp. 37-39. The district court failed to adhere to this last mentioned standard.

Respondents did not address the authorities just cited concerning the proper interpretation of a pro se complaint. However, they did recognize in their papers that the complaint was drawn without the assistance of counsel. Nevertheless, their basic position, in attempting to read the complaint narrowly, was inconsistent with those authorities.

The motion for summary judgment should also have been denied. It was apparent from the moving papers that discovery proceedings are required and Rule 56 of the Federal Rules of Civil

Procedure, permits discovery with respect to, and prior to determination of a motion for summary judgment.

The papers in support of the motion for summary judgment, including the defendant's memorandum of law, were simplistic in stating that there is no disputed issue of material fact in this case.

The first issue of fact deals with intentional discrimination. It is whether the respondents knew that the petitioner was Jewish. The petitioner's name is a Jewish name and petitioner does not know of any family with that name that is not Jewish. It should be developed on discovery whether respondents Harlows, who are both educated people, knew that the name Sckolnick was a Jewish name. It should

also be developed on discovery whether or not upon first hearing that the petitioner was a member of the Board of Health in Leverett, which was about ten days prior to his written offer, the respondents made inquiries concerning him from their friends in Leverett. Upon information and belief, the respondents lived in Leverett for some years prior to moving to Pelham, Massachusetts.

Although the facts of this case strongly suggest subjective discriminatory motivation on the part of the respondents, this Court has made it clear that such motivation is not required as an element of petitioner's case. Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 265 (1977). The proper test deals with disparate treatment of the

petitioner as compared with the non-minority friend of respondents to whom the property was sold. See Robinson v. 12 Lofts Realty, 610 F.2d 1032 (CA2, 1979). Under Robinson, the moving papers can be seen to concede on their face the existence of a prima facie case of disparate treatment: (i) that the petitioner is a member of a protected minority as a member of the Jewish religion, (ii) that he made the first written and binding offer which respondents received for the property, (iii) that his was the only offer to be made on standard forms of a real estate brokerage, (iv) that defendants had his offer under active consideration and communicated this fact to his real estate agent, (v) that respondents rejected his offer and refused to permit a

counteroffer in order to get the best price, (vi) that the property was sold, on information and belief, to a non-minority person while my offer was still pending or simultaneously with its rejection, and (vii) that Kathy Stefan Real Estate, Inc. the listing brokerage notified the Multiple Listing Service that the property had been cancelled-not-that it had been sold.

Where issues of whether a discriminatory act has been perpetrated, the inappropriateness of summary judgment as an issue of fact is typically presented. See Metro Fair Housing Services v. Morrowood Garden Apartments Ltd, 576 F. Supp. 1090 (N.D. Ga. 1983).

The articulation of business purpose or profit motive also presents a question of fact because of the particular circum-

stances under which the purpose is articulated. The respondents state they were asked by petitioner's real estate agent to make a counter offer and that they refused. It is common practice in real estate dealings to make such counter offeres in order to obtain the best price. The respondent, David R. Harlow, admits in his affidavit of April 25, 1986 that he was a part-time real estate agent. Given his experience as a real estate agent, if he were interested in obtaining the best prices, he would have followed the common practice of asking the person making the first offer, the petitioner, through his real estate agent whether he was prepared to pay a higher price. The respondents failure to permit a counter offer, even when it was suggested by petitioner's real estate agent,

makes their articulation of business purpose entirely lacking in credability. Respondents also rejected petitioner's offer of $11,600 during H.U.D. conciliation proceedings.

Respondents pretext of business purpose is not a new one. It has been seen repeatedly by courts in many jurisdictions in housing discrimination cases. The familiar pattern involves the conveyance of the property to a relative or friend on the presentation of an offer by a minority group member. Dillon v. AFBIC Development Corporation, 597 F.2d 556 (CA. 5, 1979); Dillon v. Bay City Construction Co., 512 F.2d 801 (CA. 5, 1975); Hughes v. Dyer, 378 F. Supp. 1305 (W.D. MO., 1974).

The facts indicating a mere pretext of business purposes in the case at bar

are particularly glaring. Respondents did not leave the sale of the property in the hands of their broker. They took the matter into their own hands and allege that a hand written offer with a cash deposit of $100.00 was brought to themselves over the weekend. The deposit lacks a receipt and the source of the money along with where it went have yet to be accounted for. The alleged offer could have been drawn up at any time and as will be shown the respondents in their affidavits contradict this very same alleged offer. On the following Monday, September 23, they refused my real estate broker's request to entertain a counter-offer while not mentioning any other party. The respondents did make mention of my position on the Board of Health and my real estate broker told me that they

told him that they would not sell to me under any circumstances. My real estate broker's affidavits to the contrary are contradicted by his own handwritten note of September 23, 1985.

The petitioner first learned of the land in question in early September 1985 from Warren B. Glazier, a real estate broker in Leverett and an uncle by marriage to Laura J. Howard, the person who allegedly made the second and only other offer which was accepted by the respondents. It should further be noted again that the respondents dealt directly with Howard and that she did not seek the formal counsel of her uncle during these transactions. When the petitioner first learned of the land from Warren B. Glazier no mention was made of any other interested party.

On September 9th 1985 Howard and the petitioner learned at the Board of Health meeting that they were both interested in the same land. They both expressed interest in respondent's land at that meeting.

On September 10th 1985 the petitioner met with real estate agent Philipp Pless at his office in Greenfield. The petitioner explained to Pless his interest in the Harlow's land and the fact that Howard was also interested in the same land. From that meeting on and in all of petitioner's dealings with Pless regarding said land, petitioner requested that he telephone Kathy Stefan Realty which listed the respondent's property to inquire if Howard had made an offer and if the land was still available for sale. In all those telephone calls from

September 10th through September 19th, 1985, Pless informed the petitioner that he was never told of any other interested party. Respondent's affidavits confirm that petitioner's offer was the first offer made.

On September 23rd, 1985, Harlow rejected petioner's offer of September 19th. When he spoke to Pless he told petitioner of the rejection and he also told him there was no counter offer permitted by respondents. Pless seemed saddened by this and told him that this was only the second time in his career that this had happened. Pless also told him that Harlow made some remarks about my being on the Board of Health. In closing, Pless told him that Harlow said emphatically that he would never sell him the land.

On October 2nd, 1985, prior to typing his complaint for H.U.D., he telephoned Kathy Stefan's office and was told that the land was still on the market and that there were no known offers. The attempted explanation of this by respondent creates another issue of fact.

On page two of Howard's handwritten alleged offer she talks of no "formal" mortgage or loan. However, petitioner's investigation indicates that a mortgage may have been involved. The question of a mortgage creates another issue of material fact.

On April 23rd, 1986, I showed to the chief teller of the main branch of Heritage Bank in Amherst a xerox of a FILE COPY (not the endorsed original bank check because Howard has yet to produce it) of a payment made out to

Laura Howard for $11,500.00 dated October 11, 1985. Upon examing the copy the teller told the petitioner that she had never seen that type of check form before. The teller then took the form upstairs to the mortgage department. When the teller returned, she told the petitioner it was a mortgage payment. This raises a question of fact as to whether there was an undisclosed mortgage in the Howard transaction although respondents make a point of claiming there was no mortgage "condition" in Howard's offer. Failure to obtain a mortgage would have meant the forfeiture of only $100, if, between friends, it was, indeed, to be forfeited, and, if, as alleged, the deposit was actually delivered.

Respondents claim they received the

$100 deposit in cash from Howard over the weekend on September 21st, yet the payment allegedly delivered to Howard's attorney is for the full price and dated October 11, 1985. The settlement form, dated October 30 credits the full $11,500 and has a blank space next to 'deposit' in the Buyer's Column. The purported purchase and sale agreement dated October 3, 1985, the very day after petitioner mailed David R. Harlow a carbon copy of his H.U.D. complaint, signed only by Laura Howard without the respondents Harlows and lacking notarization recites that a $100 deposit was paid that day, not on September 21st, as claimed by respondents.

In David R. Harlow's Affidavit, we are told that Howard brought a cash deposit of $100 to his home on September

21st, 1985. Howard's handwritten offer has the handwritten acceptance of the offer by the Harlows and a handwritten receipt for $100 written therein. Yet, Howard in her sworn H.U.D. statement claimed that she did not "learn" of the acceptance until September 27, 1985, when she returned from vacation. In his affidavit, David R. Harlow states that he called Laura Howard and accepted her offer by telephone on September 23, 1985, although his signature shows he accepted on September 21st, the day Laura Howard allegedly came personally to his house.

The most glaring pretext, one which should not have been countenanced by respondent's counsel is that the land was not sold as a building lot when both bidders made it clear that they intended to use the land for a building lot as

soon as they obtained the necessary road frontage. The Harlow's affidavits show that they know of the petitioner's intention to build and Laura Howard's intention to build when they called her (without contacting their broker) and asked her to bid. In her sworn H.U.D. statement, Laura Howard states clearly that she bid $11,500 on the basis of her hope of getting frontage in order to build.

There is no purchase and sale agreement signed by all of the parties. The purchase and sale agreement given by respondents to H.U.D. is dated October 3, the very day that the Harlows state via Jeanne L. Harlow's affidavit that they received a copy of my complaint to H.U.D.. It is signed only by Howard and it is not notarized.

The purported escrow agreement is

signed by the Harlows only and is not notarized.

In David R. Harlow's Affidavit, he talks of giving Howard a "fair opportunity" to counter. In that same affidavit he also refers to Howard's opportunity to counter. Would not fairness, let alone profit motive, dictate that the petitioner be given a fair opportunity to meet or bid higher than Howard's offer?

On January 15, 1986 Linda Klein of H.U.D. requested a counter offfer from me and I then offered $11,600.00. The Harlows did not accept my offer and cannot claim business purpose or profit motive. They are clearly guilty of disparate treatment of myself as a minority group member who made the first offer for the land advertised for sale by their real estate broker.

On July 17, 1986 without oral argument the district court granted respondents motions to dismiss and for summary judgment.

On October 6, 1987 without oral argument the court of appeals affirmed the finding of the district court.

On December 31, 1987 the appeals court declined petitioner's petition for rehearing.

On March 21, 1988 the petitioner filed his notice of appeal with the appeals court.

REASON FOR GRANTING THE WRIT

Where petitioner shows the existence of genuine issues of material fact, due process demands a trial on the merits and the vacation of the judgment.

In O'Connor v. Ortega, this Court reasserted the rule that summary judgment is appropriate only if the facts themselves are beyond genuine dispute and require judgment as a matter of law without the necessity of drawing inferences from the facts, 107 S. Ct. 1492, at 1504 (1987).

In the moving papers filed by the respondents there was no indication as to which facts, if any, were actively disputed and which facts were treated by the parties as not subject to substantial dispute. What the moving papers do show are numerous contradictions. The peti-

tioner in his opposition to the moving papers did show the existence of numerous issues of material fact. Thus, the record was not ripe for summary judgment at the time under Rule 56, FRCP.

On July 17, 1986 the record was not adequate for an award of summary judgment because the petitioner had not yet completed discovery and because the burden is on the moving parties to show that no genuine issue as to any material fact exists. Berrios v. Perchik, 20 Mass. App. Ct. 930, 479 N.E. 2d 695 (1985).

On July 17, 1986, the moving papers themselves bristled with unresolved factual issues requiring a trial on the merits.

The Order granting summary judgment did not examine the original check nor did it attempt to account for the sources

and final disposition of the alleged monies and did not, as required by Rule 56, FRCP, determine that there were no genuine issues as to the material facts. On the contrary, the Order granting summary judgment indicated a subsidiary material fact as to which there was genuine dispute by the petitioner, viz. "did the Harlows intend to offer the vacant land for sale "for the construction or location thereon of any building structure or portion thereof." 42 U.S.C. Sec. 3602(b)." RA25-RA26. In its Order/Memorandum, the district court erroneously attempts to resolve that disputed factual issue upon the affidavits and conflicting facts presented by the respondents-let alone those presented by the petitioner, when on its face, the district court's

reasoning acknowledges that there continues to be a dispute. (Id.)

In John C. Donahue v. Windsor Locks Board Of Fire Commissioners, ET AL., 834 F.2d 54 at 55 (2nd Cir. 1987) Judge Kaufman states:

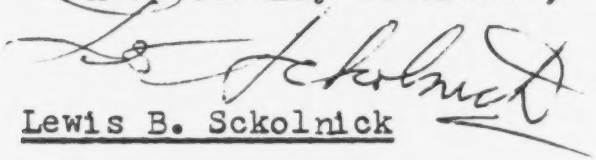
> The fundamental obligation of the federal courts is to adjudicate disputes. Not all controversies present triable issues, however, and the courts have a responsibility to vigilantly weed out those cases that do not merit further judicial attention. The procedural tool of summary judgment enables courts to terminate meritless claims, but this potent instrument must be used with the precision of a scalpel. The courts must take care not to abort a genuine factual dispute prematurely and thus deprive a litigant of his day in court.

The judgment entered on October 6, 1987, affirming the district court's granting of summary judgment, should be vacated for the reason that there appeared on the face of the moving papers and the opposition thereto genuine issues

as to material fact and further that the district court in its Memorandum concedes that there is an issue as to material fact.

For the foregoing reasons, petitioner Lewis B. Sckolnick respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,



Lewis B. Sckolnick

511 Long Plain Road

Leverett Ma 01054-9740

413 548 9279

March 30, 1988

RECORD APPENDIX

UNITED STATES COURT OF APPEALS

For The First Circuit

No. 86 1774 Date: March 21, 1988

LEWIS B. SCKOLNICK

Plaintiff, Appellant,

v.

DAVID R. HARLOW, ET AL.,

Defendants, Appellees.

NOTICE OF APPEAL

The Plaintiff, Appellant, Lewis B. Sckolnick, herein appeals to the Supreme Court of the United States from the Judgment entered by this Court on October 6, 1987, the same denied Rehearing on December 31, 1987.

This appeal is being taken in conformity with Title 28, United States Code, Section 1254(1).

RA1

Respectfully,

LEWIS B. SCKOLNICK

Lewis B. Sckolnick

511 Long Plain Road

Leverett Ma 01054-9740

413 548 9279

CERTIFICATE OF SERVICE

Copy this day to counsel for all of the Appellees via U.S. Mail First Class Postage Pre Paid.

LEWIS B. SCKOLNICK

Lewis B. Sckolnick

U.S. COURT OF APPEALS

RECEIVED

MAR 23 1988

FOR THE FIRST CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86 1774

LEWIS B. SCKOLNICK

Plaintiff, Appellant,

v.

DAVID R. HARLOW, ET AL.,

Defendants, Appellees.

JUDGMENT

Entered: October 6, 1987

This cause came to be submitted on the briefs and the original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as

follows: The judgment of the district court is affirmed. Appellees' request for attorney's fees and costs is denied.

By the Court:

Francis P. Scigliano

Clerk.

(cc: Messrs: Sckolnick, Seewald, Dibble and Ms. Crowley)

RA4

(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 86 1774

LEWIS B. SCKOLNICK,

Plaintiff, Appellant,

v.

DAVID R. HARLOW, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES

DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Frank H. Freedman,

U.S. District Judge)

RA5

Before

Bownes, Breyer and Torruella,

Circuit Judges.

Lewis B. Sckolnick on brief pro se.

October 6, 1987

RA6

Per Curiam. The judgment of the district court is affirmed for the reasons set forth in the district court's July 17, 1986 memorandum.

Appellees' request for attorney's fees and costs is denied.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LEWIS B. SCKOLNICK,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION
	)	
DAVID R. HARLOW,	)	NO. 85 0491 F
	)	
JEANNE L. HARLOW,	)	
	)	
LAURA JEANNE HOWARD,	)	
	)	
KATHY STEFAN	)	
	)	
REAL ESTATE, INC.,	)	
	)	
KATHY STEFAN, and	)	
	)	
ANDREA BELMONT,	)	
	)	
Defendants	)	

ORDER

July 17, 1986

FREEDMAN, D.J.

For the reasons set forth in a Memorandum issued this date, it is

ORDERED:

1) Motion of defendants Kathy Stefan Real Estate, Inc., Kathy Stefan and Andrea Belmont to dismiss for failure to state a claim is ALLOWED;

2) Motion of defendants David R. Harlow and Jeanne L. Harlow for summary judgment is ALLOWED;

3) Motion of Laura J. Howard to dismiss is ALLOWED.

It is So Ordered.

FRANK H. FREEDMAN
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LEWIS B. SCKOLNICK,	)	
	)	
Plaintiff	)	
	)	
v.	)	CIVIL ACTION
	)	
DAVID R. HARLOW,	)	NO. 85 0491 F
	)	
JEANNE L. HARLOW,	)	
	)	
LAURA J. HOWARD,	)	
	)	
KATHY STEFAN	)	
	)	
REAL ESTATE, INC.,	)	
	)	
KATHY STEFAN, and	)	
	)	
ANDREA BELMONT,	)	
	)	
Defendants	)	

MEMORANDUM

July 17, 1986

FREEDMAN, D.J.

This is a pro se action brought pursuant to Title VIII of the Civil

RA10

Rights Act of 1964, as amended, 42 U.S.C. Sec. 3501, et seq. Plaintiff alleges that defendants David R. Harlow and Jeanne L. Harlow refused to sell plaintiff a parcel of land in Leverett, Massachusetts because of his religion. The other defendants are Laura J. Howard, the eventual purchaser of the land, Kathy Stefan Real Estate, Inc., the sellers' real estate agency, and two of its agents, Kathy Stefan and Andrea Belmont.

Now before the Court are defendants Kathy Stefan Real Estate, Inc., Kathy Stefan and Andrea Belmont's motion to dismiss for failure to state a claim, defendants David and Jeanne Harlow's motion to dismiss for failure to state a claim, or in the alternative, for summary judgment, and defendant Howard's motion to dismiss for lack of service.

RAll

I. FACTS

The following facts appear not to be in dispute:

David and Jeanne Harlow were joint owners of a parcel of land consisting of approximately 19.3 acres located on North Leverett Road, in Leverett, Massachusetts. In June of 1985, the Harlows listed the parcel with Kathy Stefan Real Estate, Inc., with an asking price of $13,900. Plaintiff came to learn about the parcel from Warren B. Glazier, a Leverett real estate broker and an uncle by marriage to defendant Howard.

Both plaintiff and defendant Howard expressed interest in the land at a September 9, 1985 meeting of the Leverett Board of Health. Plaintiff was a member of that Board. On

September 10, 1985 plaintiff met with real estate agent Phillip Pless at his office in Greenfield. Plaintiff and Pless viewed the property together.

On September 19th plaintiff tendered, through Pless and Kathy Stefan Realty, an offer to purchase the land for $7,500 with a $500 earnest money deposit. The offer was contingent on plaintiff's ability to obtain a five-year mortgage loan for $5,500 at not more than 13% per annum with monthly payments of approximately $125. The offer was also contingent on the property "being a legal building lot." Plaintiff agreed to a closing on or before November 1, 1985. By its terms the offer was open until September 23rd.

Defendants Mr. and Mrs. Harlow received plaintiff's offer on

September 20, 1985. Mr. Harlow told Mr. Pless that they considered the offer extremely low, but that they would consider it over the weekend. Also on September 20th, Mr. Harlow telephoned Laura Howard to tell her he had received an offer on the property.

On September 21st, Mrs. Howard tendered a written offer to purchase the property for $11,500 with a cash deposit of $100. The offer contained no contingencies and specified a closing date of October 15, 1985 "or at your convenience." The offer also stated that a family member was loaning her the money, so no bank mortgage would be involved. The offer was open until September 26th.

On September 23rd, Mr. Harlow Telephoned Mr. Pless and told him that they were rejecting plaintiff's $7,500

offer because he was negotiating with another party who made a better offer and who was trying to buy the abutting land. On October 2, 1985, plaintiff telephoned Kathy Stefan Real Estate, Inc., and was incorrectly told that the land was still on the market and that there were no known offers.

A purchase and sales agreement was drawn up by the Harlows' lawyer on October 3, 1985 setting the closing for October 15, 1985. The agreement was sent to Howard's attorney on October 7, 1985. On October 11, 1985 Mrs. Howard obtained a bank check in the amount of $11,500. The same day, she met with her attorney, signed the agreement, and turned the check over to him. On October 16, 1985, the Harlows signed the deed for the property and left it with their attorney.

On October 29, 1985, Mrs. Howard's attorney met with the Harlows' attorney for the closing. The following day, another attorney for the buyer went to the registry to record the deed and learned that the plaintiff had filed a notice of lis pendens against the property. After some discussion among the parties, they agreed to record the deed and to enter into an escrow agreement. The deed was recorded on November 15, 1985.

Plaintiff filed complaints with the United States Department of Housing and Urban Development ("HUD") and with the Massachusetts Commission Against Discrimination ("MCAD"). Both complaints were unsuccessful.

II. DISCUSSION

A. Defendants Kathy Stefan Real Estate, Inc., Kathy Stefan and Andrea Belmont's Motion to Dismiss

These defendants move, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss this action against them only on the ground that they, as listing agents, "had no authority to decide to whom the property in question would be sold."

The standard to be used in ruling on a motion to dismiss under Rule 12(b)(6) is a familiar one, formulated by the Supreme Court as follows:

> in appraising the sufficency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). In addition, particular liberality is required in construing the pleadings of a pro se litigant. See Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam).

Even under this high standard, the Court has little doubt that these defendants are entitled to a dismissal under Rule 12(b)(6). While it is well settled that a real estate agent or agency can be liable under Title VIII under certain circimstances, see, e.g., Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1979)(racial steering); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir.), cert. denied, 414 U.S. 826 (1973) (blockbusting), plaintiff's complaint alleges nothing more against these

defendants than that they represented allegedly discriminatory sellers in a real estate transaction. Not a hint of wrongful conduct on the part of the agents is present in this case.

Accordingly, the Court will allow the motion of defendants Kathy Stefan Real Estate, Inc., Kathy Stefan and Andrea Belmont to dismiss for failure to state a claim.

B. Defendants David Harlow and Jeanne Harlow's Motion to Dismiss for Failure to State a Claim, or,in the Alternative, for Summary Judgment

Mr. and Mrs. Harlow contend that plaintiff's complaint fails to state a claim under Title VIII of the Civil Rights Act because the property they offered for sale was not a "dwelling" for purposes of the Statute.

Section 804 of Title VIII makes it unlawful

> (t)o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

42 U.S.C. Sec. 3604(a). A dwelling is defined in section 802 as

> any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any building structure, or portion thereof.

42 U.S.C. Sec. 3602(b).

Defendants contend that because the property was classified as forest land pursuant to Mass. Gen. Laws ch. 61A, and was not suitable for building, it was not "offered for sale or lease for the construction or location thereon of any

building...." See United States v. Mintzes, 304 F. Supp. 1305 (D. Md. 1969).

Inasmuch as matters outside the pleadings have been submitted concerning this matter, the Court shall treat this portion of the Harlows' motion as a motion for summary judgment. Fed. R. Civ. P. 12(b).

Plaintiff responds to the Harlows' allegation by noting that, contrary to defendants' assertion that the sellers did not undertake the procedures prescribed by ch. 61A for selling the land for residential use, the Harlows did, in fact, undertake some of the necessary steps. Plaintiff points to a copy of the Town of Leverett's rejection of the mandatory first refusal option, see Mass. Gen. Laws ch. 61A, Sec. 14,[1] the insertion of a $1,000 escrow obligation

in the "Settlement Statement" prepared for the sale of the property, and the

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[1] This section provides, in pertinent part:

> Land which is valued, assessed and taxed on the basis of its agricultural or horticultural use under an application filed and approved pursuant to this chapter shall not be sold for or converted to residential, industrial or commercial use while so valued, assessed and taxed unless the city of town in which such land is located has been notified of intent to sell for or convert to such other use....

payment of a conveyance tax for the sale of chapter 61A property for other than agricultural or horticultural use.[2] In

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[2] Section 12 of chapter 61A provides:

> Any land in agricultural, horticultural or agricultural and horticultural use which is valued, assessed and taxed under the provisions of this chapter, if sold for other use within a period of ten years from the date of its acquisition or the earliest date of its uninterrupted use by the current owner in agriculture or horticulture, whichever is earlier, shall be subject to a conveyance tax applicable to the total sales price of such land, which tax shall be in addition to such taxes as may be imposed under any other provision of law.

addition, plaintiff claims that Mrs. Howard hired an engineer and backhoe operator to conduct a perc test on the property on May 15, 1986. As stated by plaintiff, "if this was a wood lot as has been claimed and not the site of future development for residential purposes there would not exist the need for Howard to undergo the burden of hiring an engineer in MacLeay and a backhoe operator from Stoney's Excavating." Plaintiff's Second Supplemental Answer to Reply Memorandum of Defendants Harlow.

A motion for summary judgment may be allowed only if the pleadings, discovery material and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Fed R. Civ. P. 56(c). The Court must view the record "in the light most favorable to the party opposing the motion and must indulge all inferences favorable to that party." Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976). Where intent is a material issue, summary judgment is rarely appropriate. 6 J. Moore & J. Wicker, Moore's Federal Practice, Part 56.17 (41.-1) (1985).

Considering the matter in this light, the Court believes that plaintiff has responded to defendants' motion adequately to raise the existence of a material fact in dispute; viz, did the Harlows intend to offer the vacant land for sale "for the construction or location thereon of any building structure or portion thereof." 42 U.S.C.

Sec. 3602(b).

The Harlows also contend there is no genuine issue in dispute as to the question of whether they committed a discriminatory housing practice, and thus, they are entitled to summary judgment as a matter of law.

In support of their motion, the Harlows have submitted an affidavit setting forth the reasons why plaintiff's offer to purchase the property was rejected and Mrs. Howard's offer accepted. The most obvious reason was that Mrs. Howard's offer was for $11,500 in cash rather than plaintiff's offer of $7,500 contingent on his obtaining a mortgage. Further, Mrs. Howard's offer contained an earlier closing date and did not contain a contingency similar to one contained in plaintiff's offer that the land be

suitable for building. Mr. and Mrs. Harlow also state that at the time they acted on plaintiff's and Mrs. Howard's offer, they did not know to what faith Mr. Sckolnick belonged, and further, that the religion of Mrs. Howard and the plaintiff played no part in the defendants' decisions.

Once the defendants set forth in affidavits nondiscriminatory reasons for failing to accept plaintiff's offer, plaintiff may not rest on mere allegations but must demonstrate "specific facts showing that there is a genuine issue for summary trial" to defeat defendants' motion. Fed. R. Civ. P. 56(e); see Stepanischen v. Merchants Despatch Transportation Corp., 722 F.2d 922, 929 (1st Cir. 1983).

Having carefully considered all of

plaintiff's numerous responses to defendants' motion, the only contested issue appears to be whether the Harlows knew Mr. Sckolnick was Jewish.[3]

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[3] Interestingly, Mr. Fless, plaintiff's real estate agent, who himself is Jewish, stated in his affidavit that he "had no idea that Mr. Sckolnick was Jewish until after he filed the MCAD and HUD suits."

However, even if the Harlows did know Mr. Sckolnick was Jewish, a Fair Housing violation would not thereby be shown. As stated in a case cited by defendants, Kaplan v. 442 Wellington Cooperative Building Corp., 567 F. Supp. 53, 59 (N.D. Ill. 1983),

> A 3604 case is never to be made out on the mere suspicion that because the plaintiff's minority status is known to the defendant, the defendant's action rejecting the plaintiff necessarily resulted at least in part from some pre-existing bias. It was not the intent of Congress either in 1866 or in 1964 to give any factual weight whatsoever to mere suspicions. Suspicions in this area of interplay among the peoples of a pluralistic society are understandable reactions of numbers of minorities, but in cases like these the court should proceed no further when it finds as here that complainant's charges rest on nothing more.

This Court, too, can preceive nothing more than plaintiff's unsubstaniated suspicions. Accordingly, the Court will

allow the Harlows' motion for summary judgment.

C. Defendant Howard's Motion to Dismiss for Failure to Make Service

Defendant Howard has appeared specially to move to dismiss on the ground that plaintiff has failed to make service on her. Ordinarily, the Court would deny the motion and permit the plaintiff to re-serve a complaint and summons on the defendant. However, in view of the Court's disposition of the Harlows' motion for summary judgment, it is plain that nothing is to be gained by permitting plaintiff to proceed against the buyer of the property when it has already found, as a matter of law, that the seller is not liable under the Fair Housing Act. Accordingly, the Court will allow defendant Howard's motion to

dismiss.

An appropriate Order shall issue.

Frank H. Freedman
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

LEWIS BARNARD SCKOLNICK

V.

DAVID R. HARLOW, ET AL

JUDGMENT IN A CIVIL CASE

CASE NUMBER 85-0491-F

_ Jury Cerdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

RA31A

IT IS ORDERED AND ADJUDGED

JUDGMENT FOR THE DEFENDANTS PURSUANT

TO THE MEMORANDUM AND ORDER OF THE

COURT ENTERED ON JULY 17, 1986.

July 18, 1986
Date

George F. McGrath
Clerk

John C. Stuckenbruk
(By) Deputy Clerk

RA31B

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86 1774

LEWIS B. SCKOLNICK

Plaintiff, Appellant,

v.

DAVID R. HARLOW, ET AL.,

Defendants, Appellees.

JUDGMENT

Entered: October 6, 1987

This cause came to be submitted on the briefs and the original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as

follows: The judgment of the district court is affirmed. Appellees' request for attorney's fees and costs is denied.

By the Court:

Francis P. Scigliano

Clerk

(cc: Messrs: Sckolnick, Seewald, Dibble and Ms. Crowley)

RA33

(NOT FOR PUBLICATION)

UNITED STATES COURT OF APPEALS

For the First Circuit

No. 86 1774

LEWIS B. SCKOLNICK

Plaintiff, Appellant,

v.

DAVID R. HARLOW, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES

DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Frank H. Freedman,

U.S. District Judge)

Before

Bownes, Breyer and Torruella,

Circuit Judges.

Lewis B. Sckolnick on brief pro se.

October 6, 1987

RA35

Per Curiam. The judgment of the district court is affirmed for the reasons set forth in the district court's July 17, 1986 memorandum.

Appellees' request for attorney's fees and costs is denied.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 86 1774

LEWIS B. SCKOLNICK

Plaintiff, Appellant,

v.

DAVID R. HARLOW, ET AL.,

Defendants, Appellees.

Before

Bownes, Breyer and Torruella,

Circuit Judges.

ORDER OF COURT

Entered December 31, 1987

Appellant's petition for rehearing is denied.

By the Court:

Francis P. Scigliano

Clerk.

(cc: Mr. Sckolnick, Mr. Seewald, Mr. Dibble and Ms. Crowley.)

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

LEWIS B. SCKOLNICK,

PETITIONER,

v.

DAVID R. HARLOW,
JEANNE L. HARLOW,
LAURA J. HOWARD,
KATHY STEFAN REAL ESTATE, INC.,
ANDREA BELMONT,

RESPONDENTS.

PROOF OF SERVICE

COMMONWEALTH OF MASSACHUSETTS)
) ss.:
COUNTY OF FRANKLIN)

LEWIS B. SCKOLNICK, after being duly sworn, deposes and says that pursuant to Rule 28.3 of this Court he served the within PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF APPEALS FOR THE FIRST CIRCUIT on counsel for the Respondents by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Francis Dibble
1500 Main St #2700
Springfield Ma 01115

Alan Seewald
5 East Pleasant St
Amherst Ma 01002

Richard Howland
Box 770
Amherst Ma 01004

and depositing same in the United States mails at Amherst, Massachusetts, on 30 March 1988.

Lewis B. Sckolnick, Affiant

Subscribed and Sworn to Before Me this 30 Day of March 1988.

NOTARY PUBLIC
MY COMMISSION EXPIRES OCT. 1991

Notary Public In and For
Said County and State